No. 85-1370

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

STEPHEN H. SACHS,
Attorney General of Maryland,
RALPH S. TYLER, III,
Assistant Attorney General,
Counsel of Record,
CARMEN M. SHEPARD,
Special Assistant Attorney General,
The Munsey Building, 2nd Floor,
Seven N. Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6300,
Attorneys for Amicus
State of Maryland.

September, 1986

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

SUMMARY OF ARGUMENT AND INTEREST OF AMICUS.....2

ARGUMENT.....3

I. State Exercise of their Taxing Power.....3

A. Importance of Retail Sales Tax to the States...3

B. Responsiveness of State Tax System to Local Needs.....6

II. States May Subject Publications to Generally Applicable Economic Regulation.....16

III. States Have the Power to Adjust Their Taxing Systems to Accomodate Local Needs....18

CONCLUSION.....26

TABLE OF AUTHORITIES

Cases

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959).....20

Branzburg v. Hayes, 408 U.S. 665 (1972).....17

Buckley v. Valeo, 424 U.S. 1 (1976)...21

Grosjean v. American Press Co.,
297 U.S. 233 (1936).....17,22

Mabee v. White Plains Publishing,
327 U.S. 178 (1946).....16,21

Madden v. Kentucky,
309 U.S. 83 (1940).....19

Minneapolis Star & Tribune v.
Minnesota Commissioner of
Revenue, 460 U.S. 575
(1983).....passim

Murdock v. Pennsylvania,
319 U.S. 105.....22

NAACP v. Alabama,
357 U.S. 449 (1958).....22

Ohio Oil Co. v. Conway,
281 U.S. 146 (1930).....27

Oklahoma Press Publishing Co.
v. Walling,
327 U.S. 186 (1946).....20

Regan v. Taxation with Representation
of Washington, 461 U.S. 540
(1983).....21

Walz v. Tax Commission of City of
New York, 397 U.S. 664 (1970)...9,10

Books

B. Bailyn & J. Hench (eds.), The
Press and the American Revolution
(1980).....12

C. Duniway, Freedom of the Press in
Massachusetts (1969).....15

M. Jensen, The Founding of a Nation
(1968).....12,13,14

J. Lofton, The Press as Guardian
of the First Amendment (1980).....14

Schlesinger, Prelude to
Independence (1958).....14

F. Siebert, Freedom of the Press
in England 1476-1765 (1952).....12

Periodicals

Thompson, Massachusetts and New
York Stamp Acts, 26 Wm. &
Mary Q. 253 (1969).....15

Miscellaneous

All States Tax Reporter (CCH).....4,15

Budget Message to the General Assembly
of Maryland and the Budget
in Brief (Jan. 15, 1986).....4

Statutes

Md. Code Ann., Revenue and
Taxes, Art. 81.....passim

No. 85-1370

IN THE

SUPREME COURT of the UNITED STATES

ARKANSAS WRITERS' PROJECT, INC.,

Appellant,

v.

CHARLES D. RAGLAND, COMMISSIONER
OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

On Appeal from the Supreme Court of Arkansas

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

Pursuant to United States Supreme Court Rule 36.2, the State of Maryland submits this brief as amicus curiae in support of Appellee, Charles D. Ragland, Commissioner of Revenue of the State of Arkansas. Because

this brief is being sponsored and filed by a State, consent to its filing is not required. Sup. Ct. R. 36.4.

SUMMARY OF ARGUMENT AND INTEREST OF AMICUS CURIAE

The State of Maryland, like most other states, derives substantial revenue from a generally applicable state tax structure which imposes a tax on most retail sales, with only a few narrowly carved exceptions. The state's interest in preserving its tax structure is significant. For example, in the current fiscal year Maryland will receive over a billion dollars in revenues from its state retail sales and use tax and licenses. A significant portion of these revenues is derived from the retail sales tax on publications.

Maryland has granted certain narrow exemptions from the retail sales tax to a limited number of publications because of their unique and important interest to the

citizens. For example, Maryland, like Arkansas, has created an exemption for newspapers. Maryland also grants a general exemption to all sales for or by religious organizations, which includes any publications issued by religious organizations, irrespective of content. In addition, Maryland exempts any publications issued by the State or any of its agencies. As amicus, the State of Maryland wishes to stress the importance of preserving the integrity of its state tax system as well as its ability to carve narrow exemptions for transactions of compelling importance to its citizens.

ARGUMENT

I. State Exercise of Its Taxing Power

A. Importance of Retail Sales Taxes to the States

Retail sales taxes have long served as one of the most important revenue raising devices available to states. Most states, including amicus, have enacted generally appli-

cable sales taxes levied upon retail sales in which there is a transfer of title or possession of tangible personal property.[1] These sales taxes are a necessary supplement to the revenues derived from property and income taxes.[2] Maryland, for example, estimates that the retail sales and use tax and licenses will generate over a billion dollars in revenues in the current fiscal year, nearly a quarter of total State general funds. Budget Message to the General Assembly of Maryland and the Budget in Brief (Jan. 15, 1986).

---

[1] Only five States have no retail sales tax or gross receipts tax in effect. See All States Tax Reporter (CCH).

[2] In addition to a retail sales tax, Maryland has enacted an income tax, Md. Code Ann., Revenue and Taxes, Art. 81, §§279 - 323B; use tax, id. at §§372 - 401; gross receipts tax, id. at §§129 - 134; inheritance tax, id. at §§149 - 193; property tax and a few other miscellaneous taxes. See generally, Md. Code Ann., Revenue and Taxes, Art. 81.

A retail sales tax is a very cost-effective method for taxing consumption. One of the advantages of retail sales tax over other methods is that it utilizes the seller as the collector of the tax. Thus, the State is able to reach many transactions where the amount of the tax is relatively small without expending enormous resources.[3]

---

[3] In Maryland, for example, the tax on a sale where the price is twenty cents ($.20) is one cent ($.01); where the price is between twenty-one cents ($.21) to forty cents ($.40), it is two cents ($.02); where the price is between forty-one cents ($.41) to sixty cents ($.60), it is three cents ($.03); where the price is between sixty-one cents ($.61) and eighty cents ($.80), it is four cents ($.04); where the price is between eighty-one cents ($.81) to one dollar ($1.00), it is five cents ($.05). Md. Code Ann., Art. 81, §325(a). On any sale where the price exceeds one dollar, the sales tax is five cents ($.05) on each even dollar plus one cent ($.01) for each twenty cents ($.20) or fraction thereof in excess of the even dollars. Id.

B. Responsiveness of State Tax System to Local Needs

In devising their retail sales tax structures, states often exempt certain narrow categories of transactions that affect the special interests and needs of their citizens. For example, Maryland has chosen to exempt certain transactions affecting the fishing, farming and agricultural industry. Id. at §326(h), (v), (y) and (ll). These are industries of particular importance to the State and the exemption assists the local farmers and fishermen to sustain their trade.

Some states reflect their concern with the availability of essential services to their citizens through certain exemptions applicable to transactions involving basic goods and services. In Maryland, transactions involving the sale of water, gas, electricity, and steam provided under state-approved rates; transportation services; and sales to certain qualifying cemeteries are

exempt. Id. at §326(g-2), (n), (o), (jj) and (aaa). Maryland also exempts sales of items which can assist handicapped or ill individuals, such as medicines, many medical devices, and physical aids. Id. at §326(l), (l-1), (m), (yy) and (nn). These exemptions advance the State's interest in assuring the physical well-being of its citizens.

The State of Maryland also exempts certain sales by charitable, educational, veterans' and senior citizen's groups.[4] Most of these groups already are the recipients of State or local government benefits, whether through direct assistance or through tax exempt status. An exemption for them reduces

---

4 Sales made by hospital thrift groups, id. at §326(kk); sales to senior citizen organizations receiving government benefits, id. at §326(hh); sales to non-profit religious or educational institutions or organizations or volunteer fire departments or rescue squads, id. at §326(i); sales of food by churches, religious organizations, schools, colleges, and hospitals, id. at §326(b), are all exempt.

the transaction costs of collecting the sales tax and compensating these groups through an increase in other government benefits.

Similarly, publications issued by the State or any of its agencies are exempt from the retail sales tax. Their exemption also avoids the futile and costly exercise of taxing one arm of government to give to another.

In addition, Maryland exempts both sales made to a non-profit religious institution or organization as well as sales by a bonafide church or religious organization when made for the general purpose of the church or religious organization. Id. at §§326(c)(1)(i), (i) and (u). As an incident of this general exemption, publications sold by any such religious organizations are covered by the exemption. Through these exemptions (and others incorporated throughout the State taxing structure) the State remains scrupulously neutral in matters of religion and

preserves its strong interest in the separation of church and state.

As this Court recognized in Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S.Ct. 1409 (1970), tax exemption for churches and religious organizations has long been the pattern at both the state and federal level:

> All of the states provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches over 75 years - religious organizations have been expressly exempt from the tax.
>
> * * *
>
> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally as long as none was favored over others and none suffered interference.

397 U.S. at 677, 90 S.Ct. at 1415.

(Footnotes omitted). The interest of the state in preserving this type of tax exemption is grounded in two secular purposes. First, these religious and church organizations "contribute to the well-being of the community in a variety of non-religious ways," 397 U.S. at 687 (Brennan, J. concurring), and thereby lessen the load that would have to be borne out of state revenues. In addition, these organizations contribute uniquely "to the pluralism of American society by their religious activities." Id. at 689. For these reasons, the State's grant of tax exemption to religious organizations and churches does not violate the First Amendment.

Finally, most states, including Arkansas and Maryland, exempt newspapers from generally applicable retail sales taxes. These exemptions recognize the special historical role that newspapers have played in the

dissemination of information in the United States, as well as their current importance as one of the most accessible and timely sources of information.

The exemption for newspapers reflects a long history in the United States of safeguarding the freedom of the press. Historically, newspapers served a unique role in the dissemination of information and the enhancement of uninhibited robust public debate. Because of their comparatively modest price, they are the publications with the largest circulation among all classes of citizens. Further, because most newspapers typically are available with greater frequency than other publications, they promote timely public debate.

Newspapers were the primary focus of the early English taxes on publications. Publications in other forms, such as books, largely escaped the original English taxes. The

principal objective of the English government was the suppression of small, cheap publications that were available to the poorer classes. F. Siebert, Freedom of the Press in England 1476 - 1765 311 (1952).

Taxation as an instrument for control of the press first appeared in the United States with the Stamp Act of 1765, which taxed paper used for newspapers and other publications. Although the Colonists were outraged at all the provisions of The Stamp Act of 1765, the indignation of the colonists focused on its effects on newspapers. "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, The Founding of a Nation 126 (1968); see also, Botein, Printers and the American Revolution, in B. Bailyn & J. Hench (eds.), The Press & the American Revolution 11, 23 (1980).

Newspapers also led the public outcry against the Stamp Tax. "From the very first acts of resistance to the end of the Revolution, newspapers were in the forefront of the ideological struggle that led to independence." Id.

The newspapers, "far more than most pamphlets, appealed to the mass of people, to the masses, stirred their emotions and urged them to action." Id. at 128. Newspapers "expounded political ideas in language that made most pamphlets and formal legislative resolutions look stuffy, indeed." Id. Thus, American newspapers became a leading instrument of the struggle for independence:

> The Stamp Act crisis brought colonial newspapers to the very head of the protest movement. Newspapers abandoned their politeness and became the chief means of formulating public opinion and of stating far more radical ideas than most legislatures were willing to adopt. Newspaper writers, taking the names of the dead of history, expounded doctrines they would

> never have dared express in a public forum. It was they who raised for the first time . . . the idea that independence might be the ultimate outcome of the quarrel with Britain.

Jensen, supra, at 99; see also, J. Lofton, The Press as Guardian of the First Amendment 2 (1980). It was the newspapers' accessibility to the masses that enabled them to attain a special regard by the public:

> However little some may think of common News-Papers . . . to a wise man they appear the Ark of God, for the Safety of the People. Their fullness of general entertainment, small Bulk and Price, recommend them to everyone, and . . . awaken the Minds of many to a solid inquiry of interests they would otherwise not dream of.

Schlesinger, Prelude to Independence 82-83 (1958).

The public dislike for taxes on newspapers was reflected in many states. The few states, such as Massachusetts and New York, which attempted to levy taxes on

them were unable to maintain them for long. See Thompson, Massachusetts and New York Stamp Acts, 26 Wm. & Mary Q. 253, 257 (1969); C. Duniway, Freedom of the Press in Massachusetts 136 (1969).

This concern with the untrameled access to newspapers fueled the drafting of the First Amendment protections. This concern is now reflected in the fact that the vast majority of states exempt newspapers from retail sales taxes.[5]

In sum, the retail sales tax is an important revenue raising device to the states. Equally important to the states is the sales tax's flexibility to accomodate narrow categories of transactions of compelling importance to the states.

---

[5] Only eight (8) states levy a tax on sales of newspapers to consumers. See All States Sales Tax Reporter (CCH) ¶7-275.

II. States May Subject Publications to Generally Applicable Economic Regulation

The First Amendment does not prohibit all regulation of publications. It is beyond dispute that the States can subject newspapers and other publications "to generally applicable economic regulation without creating constitutional problems." Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369 (1983). "As the press has business aspects it has no special immunity from laws applicable to business in general." Mabee v. White Plains Publishing Co., 327 U.S. 178, 184, 66 S.Ct. 511, 514 (1946).

A generally applicable sales tax is precisely the type of general economic regulation that is constitutionally permissible. Minneapolis Star, 460 U.S. at 586 n.9, 103 S. Ct. at 1372 n. 9. Although all taxes impose a "burden" on the subject, the First Amendment

"does not invalidate every incidental burdening of the press that may result from the enforcement of . . . civil statutes of general applicability." Branzburg v. Hayes, 408 U.S. 665, 682, 92 S.Ct. 2646, 2657 (1972).

States, therefore, possess the power to assess taxes against sales of books, magazines or newspapers, so long as it results from a generally applicable system. The requirement of general applicability is not, however, a rigid constitutional prescription. Rather, it is derived from the proposition that a government will not "destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." Minneapolis Star, 460 U.S. at 585, 103 S.Ct. at 1371. Thus, in Grosjean v. American Press Co., this Court invalidated a license tax which was paid by only a few of the state newspapers with the largest circulation. And later, in

Minneapolis Star, this Court invalidated a "use tax" on the cost of ink and paper, which was paid by only a few of the largest local newspapers. These cases demonstrate that States may not excessively burden publications through the use of a tax system, but they are not prohibited from imposing any burden at all. Absent the singling out of the press for unduly burdensome treatment, the State is free to fashion a tax system that serves its revenue needs and the interests of its citizens.

III. STATES HAVE THE POWER TO ADJUST THEIR TAXING SYSTEMS TO ACCOMODATE LOCAL NEEDS

States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Because the States are uniquely qualified to assess the needs of their citizens, they are also uniquely qualified to adjust their taxing scheme accordingly:

> Traditionally classification has been a device for fitting tax programs for local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures posses the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 407-408 (1940) (footnotes omitted). Accordingly, classifications devised by State legislatures in response to local needs are entitled to a great deal of deference:

> The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition or value.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527, 79 S.Ct. 437, 440 (1959). See also Minneapolis Star, 460 U.S. at 600, 103 S.Ct. at 1379.

In crafting a system of taxation, the government is not constrained to afford publications every exemption it grants any other group. This issue was decided in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946), in which a publisher challenged the constitutionality of the Fair Labor Standards Act because it excluded seamen and farmworkers, but not employees of newspapers, from its scope.

Oklahoma Press recognized that the power to make rational distinctions among groups is a necessary prerequisite to democratic government. It is an attribute that is as essential for each State government as it is for the Federal government under the Fair Labor Standards Act.

The First Amendment does not itself prohibit differential treatment of persons exercising constitutionally protected rights. Regan v. Taxation with Representation of Washington, 461 U.S. 540, 103 S.Ct. 1977 (1983) (preferential tax treatment for lobbying by veterans); Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 511 (1946) (exemption for small weekly and semi-weekly newspapers from Fair Labor Standards Act); cf. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 672 (1976) ("[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes."). The interest of the First Amendment is to prohibit the abridgement of these rights. Accordingly, State regulation of protected activities is prohibited only where it has the consequence of unduly curtailing First Amendment freedoms. Cf. Minneapolis Star & Tribune, 460 U.S. at 600,

103 S.Ct. at 1376 ("But there is no infringement, and thus the Court has never required more [than a rational basis], unless the State's classifications significantly burden these specially protected rights.") (Rehnquist, J. dissenting) (emphasis in original). Thus, the focus of the inquiry into State taxation is whether the State tax classification system unduly curtails protected activity, not whether it burdens it at all:

> Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233; Murdock v. Pennsylvania, 319 U.S. 105.

NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449, 461 (1958) (emphasis added).

The principle that differential economic regulation is unconstitutional only if it results in undue abridgement is clearly

reflected in Oklahoma Press. Merely because certain specific groups are exempt from economic regulation does not mean that a State must extend similar benefits to publications. Similarly, the State need not forbear from granting the press or some other type of publication a special exemption if it does not grant the broad universe of publications similar treatment. In Minneapolis Star, this Court invalidated a state use tax on the cost of paper and ink products applicable to periodic publications and impacted on those with the largest circulation. Although the State in that case argued that the tax actually favored the press and thus was not constitutionally infirm, the Court found that, because of the differential method utilized, the tax carried with it the threat of more burdensome treatment. Minneapolis Star, 460 U.S. at 590, 103 S.Ct. at 1374. Nevertheless, the opinion indicates that this threat

can be avoided by utilizing the same method but applying a lower rate:

> If a State employed the same method of taxation but applied a lower rate to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts. . . .

Id. at 590 n.13 (emphasis in original). This is precisely the approach that Arkansas, in common with most States, employs. Retail sales taxes are generally applicable. To the extent they impose an economic burden on publications, they do so generally, in the same manner as does any other economic regulation. No individual publication is singled out for more burdensome treatment than all others.

Where this case differs dramatically from Minneapolis Star is in the State's treatment of newspapers. Whereas Minnesota singled out newspapers for potentially more burdensome treatment, Arkansas, like most other States, affords newspapers quantifiably more favorable treatment. Thus, the exemption afforded by Arkansas to newspapers and a few other types of publications is precisely what this Court has determined constitutes a permissible exercise of a legislature's power.

As shown above, the States have a rational basis for the classifications of publications which they exempt from retail sales tax. Moreover, these classifications correspond to interests of compelling importance to the states. Newspapers in Maryland and most other states are exempt because of their long history of service to the nation. Religious publications are exempt as an

incident of the State policy of exempting all religious institutions from state taxes. Arkansas serves similar domestic concerns by exempting other categories of publications.

CONCLUSION

All States must have the flexibility to afford certain narrow groups or enumerated transactions of particular interest to the State and its citizens differential tax treatment. The fact that a State may desire to grant a particular type of publication an exemption should not also compel it to grant the exemptions to all other publications. So long as the tax is otherwise generally applicable, there is no undue curtailment of First Amendment rights.

The power to make distinctions among transactions to protect compelling local interests is an essential aspect of a State's sovereignty. To deprive the State of this power would destroy its ability to ensure

revenue and foster local interests. Yet the prohibition appellant seeks would achieve just this purpose, for it would seriously interfere with a State's ability to provide any exemption to address a specific local need, whether it be those of farmers, veterans, religious groups or newspapers, if it does not also exempt all publications. To so hold would be to subject the essential taxing power of the State to an intolerable intrusion "hostile to the basic principles of our government." Ohio Oil Co. v. Conway, 281 U.S. 146, 159, 50 S.Ct. 310, 314 (1930).

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland,

RALPH S. TYLER, III,
Assistant Attorney General,
Counsel of Record,

CARMEN M. SHEPARD
Special Assistant Attorney
General,

Attorneys for Amicus State of
Maryland